

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

DEF  
C/M

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UTILITY METAL RESEARCH, INC.,

Plaintiff,

**MEMORANDUM AND ORDER**

Case No. 02-CV-6205 (FB) (RML)

-against-

GENERAC POWER SYSTEMS, INC.,  
ALLEGHENY ENERGY SOLUTIONS, INC.,  
and ALLEGHENY ENERGY, INC.,

Defendants.  
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*Appearances:*

*For the Plaintiff:*

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New York, NY 10018

*For Defendant Generac Power Systems, Inc.:*

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RODDY W. ROGAHN, ESQ.

Generac Power Systems, Inc.  
P.O. Box 8  
Waukesha, WI 53187

*For Defendants Allegheny Energy Services,  
Inc. and Allegheny Energy, Inc.:*

PAUL M. HELLEGERS, ESQ.  
Menaker & Herrmann LLP  
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New York, NY 10016

**BLOCK, Senior District Judge:**

By Memorandum and Order dated November 18, 2004, familiarity with which is presumed, the Court dismissed plaintiff's amended complaint with prejudice. *See Utility Metal Research, Inc. v. Generac Power Sys., Inc.*, 2004 WL 2613993 (E.D.N.Y. Nov 18, 2004). By Summary Order dated May 18, 2006, the Second Circuit Court of

Appeals “vacate[d] so much of the judgment as dismissed [plaintiff’s] claims for breach of contract and breach of warranty, and [ ] remand[ed] for further proceedings on those claims.” *Utility Metal Research, Inc. v. Generac Power Sys., Inc.*, 179 Fed. Appx. 795, 797 (2d Cir. 2006). The case proceeded to discovery before Magistrate Judge Robert M. Levy.

On May 30, 2007, Magistrate Judge Levy issued a Report and Recommendation (“R & R”) recommending that the action be dismissed for lack of prosecution: Specifically, for plaintiff’s failure to produce “requested documents supporting [its] damages claim” even after two warnings “that failure to produce this information would likely result in a recommendation that this case be dismissed.” Electronic Docket Entry dated May 30, 2007 (R & R). The R & R states that “[a]ny objections to this [R & R] must be filed with the Clerk of the Court . . . within ten (10) business days,” and that “[f]ailure to file objections within the specified time period waives the right to appeal the district court’s order.” *Id.* Notice of the R & R was electronically mailed to plaintiff’s counsel on the same day. *See id.* (Notice of Electronic Filing). To date, no objections have been filed.

Where, as here, clear notice has been given of the consequences of failure to object, and there are no objections, the Court may adopt the R & R without *de novo* review. *See Thomas v. Arn*, 474 U.S. 140, 149-50 (1985); *Mario v. P & C Food Mkts., Inc.*, 313 F.3d 758, 766 (2d Cir. 2002) (“Where parties receive clear notice of the consequences, failure timely to object to a magistrate’s report and recommendation operates as a waiver of further judicial review of the magistrate’s decision.”). The Court will excuse the failure to object and conduct *de novo* review if it appears that the magistrate judge may have committed

plain error. See *Spence v. Superintendent, Great Meadow Corr. Facility*, 219 F.3d 162, 174 (2d Cir. 2000).

As no error appears on the face of the Magistrate Judge Levy's R & R, the Court adopts it without *de novo* review. The Clerk is directed to close the case.

**SO ORDERED.**

/signed/

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FREDERIC BLOCK  
Senior United States District Judge

Brooklyn, New York  
August 22, 2007